



# DEPARTMENT OF JUSTICE

---

## "ANTITRUST AT THE TURN OF THE CENTURY"

Address By

**A. DOUGLAS MELAMED**  
Principal Deputy Assistant Attorney General  
Antitrust Division

Prepared for the

**Fourth International Symposium on Competition Policy**  
Seoul, Korea

**December 7, 1999**

It is a pleasure to participate in this Fourth International Symposium on Competition Policy. The symposium comes, of course, at the very end of the 20<sup>th</sup> Century and thus provides a fitting occasion to review, and seek to draw lessons from, our experience with competition policy during this century. Most will agree that the opening of markets and the promotion of competition by the removal of obstacles to trade and commerce, both nationally and internationally, have contributed greatly to economic growth and development.

It is a special pleasure to discuss competition policy in Seoul. Korea has been a leader in competition policy among Asia's newly-industrialized economies. Korea's recent efforts towards deregulation and a more open and transparent regulatory environment demonstrate how reliance on market mechanisms, supported by competition law, can foster economic reform and create a stronger economy and symbolize the increasing interest throughout the world in competition policy. The dedication and hard work by our hosts in making this symposium a success is further evidence of the commitment of the Korean Fair Trade Commission and the Korean Government to promoting sound and effective competition law, not only within Korea, but internationally as well.

## I

The United States' basic antitrust or competition law, the Sherman Act, was enacted 109 years ago. Only Canada's law, which was enacted 110 years ago, is older. Our long experience in antitrust enforcement has taught us many lessons -- about the harm that can be caused by private anticompetitive restraints, about the harm that can result from ill-conceived competition laws, and about the many benefits that sound competition law can provide.

It is now beyond serious dispute that open markets, and the vigorous competition they enable, create wealth for individuals and businesses alike. This is true for national economies such

as the United States, regional economies such as the European Union, and the global economy as a whole. Economic well-being in the United States has benefited enormously from the absence of barriers to interstate competition, public policies that promote vigorous competition among domestic firms, and the significant reduction of barriers to import competition. And economic well-being throughout the world has benefited enormously from the reduction of trade barriers through the GATT and the WTO, and the resulting increase in international competition, in the last half of this century. The enforcement of competition laws to prevent private restraints on competition and the erection of anticompetitive barriers that threaten the openness of markets is essential to the preservation and continuation of these gains.

It is often said, sometimes as a criticism, that antitrust law is focused on consumer welfare. The implication, in the eyes of skeptics, is evidently that, if competition law benefits consumers, it must not be good for business. That is not correct.

The idea that antitrust is concerned with consumer welfare is a useful shorthand; but, like most shorthands, it can be misunderstood. Saying that U.S. antitrust law is concerned with consumer welfare is another way of saying, as our Supreme Court has said many times, that antitrust is for the “protection of competition, not [individual] competitors.”<sup>1</sup> It means that antitrust is concerned with competition in the market as a whole and is not intended to protect or favor particular firms. Sound antitrust law is disciplined by the need for rigorous analysis of the conditions necessary for efficient marketplace competition. It protects competition by preventing private restraints that create or enhance market power.

---

<sup>1</sup>Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

Consumers benefit from antitrust enforcement because market power leads to output reductions, which can take the form of higher prices, reduced quantity, lower quality or less innovation.

But consumers are not the only beneficiaries of sound antitrust enforcement. Sellers benefit, for example, when antitrust enforcement prevents anticompetitive conduct by customers that threatens to create monopsony power -- that is, market power among buyers -- and thereby to reduce the sellers' output.

The problem with the consumer welfare shorthand is that it obscures the fact that antitrust is good for business. This critically important fact is often overlooked. It is overlooked, I believe, because antitrust usually comes to the attention of businesses when their conduct is being questioned -- when, in other words, antitrust law is an obstacle they would like to overcome. Unfortunately, the benefits of antitrust enforcement, although enormous, are less obvious and more diffuse and often do not come to the attention of the business community.

Sound antitrust enforcement benefits business in three basic ways. First, businesses are purchasers; they thus benefit to the extent that antitrust benefits purchasers. A quick review of recent cases brought by U.S. Justice Department illustrates this point. Our biggest international criminal cartel cases have involved products -- feed additives, heavy-lift barge services, vitamins, graphite electrodes -- that were sold mostly to businesses. Businesses have also been the protected consumers in our recent merger cases, which have involved products like aluminum, biotechnology, wall bearings, nickel alloys and electricity. And our non-merger civil cases have involved markets for health care services, software, transportation, electricity for industrial users and other products for which businesses are significant or sometimes the only purchasers.

Businesses are the principal consumers benefited by these cases and, more important, by the prevention in general of anticompetitive conduct that results from vigorous enforcement of sound competition laws.

Second, sound antitrust enforcement also benefits business by opening markets to investors and entrepreneurs. It does so by deterring and preventing private restraints that exclude firms from markets or hinder their ability to compete.

Third, sound antitrust enforcement enhances the ability of firms to compete in the global economy. Experience shows and research has documented that countries whose businesses face active domestic competition are more likely to be successful internationally. Competition in the domestic market toughens and hones the qualities needed for a firm to be successful in foreign markets. Firms that face vigorous domestic competition are likely to be better managed and more innovative -- not just in technology, but also in distribution, marketing and organizational structure. As one leading scholar put it, “[f]ew roles of government are more important to the upgrading of an economy than ensuring vigorous domestic rivalry. . . . Firms that do not have to compete at home rarely succeed abroad.”<sup>2</sup>

In short, in our experience, sound competition law enforcement has done what sound economic analysis has told us it would do -- it has enhanced our economy and enriched both consumers and the business community. Antitrust enforcement is also inextricably linked to our notions of democracy and freedom. As the U.S. Supreme Court has explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the

---

<sup>2</sup> Michael E. Porter, The Competitive Advantage of Nations 662 (1990).

unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.<sup>3</sup>

## II

Of course, the needs and circumstances of different nations are not identical. What is sound competition policy for one country might not make good sense for another. Some countries have common law traditions; others, civil law. Some countries have long experience with modern, market-based economies; others may have developing economies or may, until recently, have had socialist or command economies. Some jurisdictions might have unusual circumstances related to competition, such as the particular interest of the member states of the European Union in integrating their economies or the issues raised by the chaebol here in Korea. Others might have differing traditions and attitudes towards risk and rivalry.

I recognize also that all nations have values in addition to those of competition policy. Even in the United States, competition policy is sometimes sacrificed to achieve other goals. For example, in the interest of federalism, which is concerned with protecting the role of our individual states, state governments can under certain circumstances displace the federal competition policy with respect to specified, local business activities. And certain businesses are exempt from our antitrust laws, including, to mention a rather narrow but well-known example, the business of baseball, which, having long been thought of as America's "national pastime," our

---

<sup>3</sup>Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4-5 (1958).

Supreme Court ruled in a fit of sentimentality is not commerce within the reach of the antitrust laws.<sup>4</sup>

We recognize, therefore, that competition laws will vary over time and among nations and that other nations may not be able simply to copy our law, or anyone else's. Still, there are, I think, certain, fundamental principles that we all ought to share and ought to strive to enshrine in our laws. One of those principles is that, when competition policies are to be sacrificed for other goals -- when there are limits to or exceptions from competition policies -- they should be transparent, so that competition policies are not needlessly undermined and so that the benefits and costs of such compromises can be identified.

### III

The United States has had a long history of antitrust enforcement. From that history, and from my experience as an antitrust lawyer in private practice for many years and as an enforcement official for the past three years, I have gleaned some notions about the core components of a sound competition law. In my view, there are three.

First, competition law should be rooted in sound economics. Its objective should be to prevent private arrangements that interfere with the effective functioning of the market. It should be based on rigorous analysis that distinguishes between efficient rivalry and anticompetitive conduct. And it should be concerned with protecting competition, not individual competitors.

Second, sound competition policy needs to be able to evolve over time and to adapt to differing and changing circumstances. Competitive markets facilitate entrepreneurship, innovation

---

<sup>4</sup>Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922).

and economic progress. And they, in turn, pose new challenges for competition policy. Some of these challenges reflect technological changes; in the telecommunications industry, for example, new technologies have converted what was once thought to be a natural monopoly into an industry in which competition is now increasingly important and feasible. Other new challenges reflect new market circumstances; unregulated network industries, for example, in which the value of goods and services increase as the number of purchasers of those goods and services increases, are increasingly important and present new substantive antitrust issues.

Moreover, if there is one thing that our experience has taught, it is that -- even apart from external changes brought by new technologies and new markets -- our notions about what constitutes sound economic analysis change over time. In the 1960's, for example, antitrusters thought that resale restrictions imposed by a manufacturer on its distributors were almost always bad, and the U.S. Supreme Court ruled in 1967 that such restrictions constituted a per se violation of our antitrust laws.<sup>5</sup> Ten years later, after a great deal of study and debate by economists and lawyers, the Supreme Court reversed itself.<sup>6</sup> Other types of vertical arrangements, such as exclusive dealing contracts, were thought in the 1980's to be rarely if ever anticompetitive; now, by contrast, they are understood to be more problematic. In other areas, too, antitrust doctrine and the economic underpinnings of antitrust have evolved over time.

Sound competition policy must be flexible enough to change in response to new challenges and new learning about sound economic analysis. If, instead, today's notions of sound policy become ossified in immutable competition rules, competition policy risks becoming, in the

---

<sup>5</sup>United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)

<sup>6</sup>Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).



future, just another outmoded form of economic regulation that restricts competition, cannot respond to new challenges, and impairs economic efficiency. It is important, to a point, to give up the benefits of certainty in order to achieve the benefits of soundness.

The third core component of sound competition policy is that it be embodied in law, and not simply used as a tool of regulation to be applied at the discretion of government officials. By law, I have in mind the following: First, antitrust law should be embodied in legal principles of general application so that like cases are treated alike. It is fundamental to sound competition policy that neither private parties nor the government distort competition by putting a thumb on the scale through actions that favor some firms over others. An example of this principle is our pending case against Dentsply International, an American firm that has been the dominant manufacturer of artificial teeth in the United States. Our complaint alleges, in effect, that Dentsply has taken anticompetitive action to exclude its two most formidable rivals from the U.S. market; both of those rivals are foreign firms.<sup>7</sup>

Second, antitrust law should be transparent. Transparency helps to ensure that like cases are treated alike. It also, by making the legal rules more clear, reduces uncertainty and risk facing businesses and thereby enhances efficiency.

Finally, for competition policy to be law, there must be procedures to ensure that enforcement decisions are subject to review and analysis and will be upheld only if they are soundly based. In the United States, for example, the Justice Department needs to go to court and cannot enforce the antitrust laws merely by issuing orders by itself. While the procedures at

---

<sup>7</sup>United States v. Dentsply International, Inc., Civ. Action No. 99-5 (MMS) (D. Del.). See Antitrust Division's home page (<http://www.usdoj.gov/atr/cases/f2100/2164.htm>) for a copy of the complaint.

our Federal Trade Commission are different, its actions are also reviewed by the courts. Such review is necessary, not only to ensure that government decisions are sound, but also to preserve a healthy distance between business and government -- a distance that could help keep antitrust enforcement from becoming a too pervasive or heavy-handed form of oversight and thereby stifling entrepreneurship.

#### IV

As we reach the end of the 20<sup>th</sup> Century, it is clear that competition policy will continue to play an important role in promoting our economic well-being. While none of us can predict with confidence the challenges we will face in the next Century, one trend seems clear -- the increasing globalization of the economy.

Global markets present new opportunities for competition law and enforcement. Such markets are often much larger than national or regional markets and thus increase the stakes for competition law. Both the potential economic gains from robust competition and the costs of anticompetitive conduct are magnified in global markets; the size of the criminal fines for international cartels imposed by our Antitrust Division in the last few years -- which last year alone totaled nearly \$1 billion -- reflects how much is at stake.

Global markets present new challenges, too. The increasing importance of global markets means that every country has an interest in the economic well-being of other countries. It means that each of us faces an increasing prospect that our economies will be harmed by anticompetitive conduct that takes place in other countries. It means that each country has an interest in ensuring that other countries' markets remain open and unhindered by anticompetitive restraints. And it

means that each country has an interest in other countries' adoption and enforcement of sound competition laws.

The international community is responding to these challenges. In recent years, dozens of countries have adopted competition laws; more than ninety countries now have such laws. These developments are tangible evidence of the increasing commitment of the international community to open markets and economic competition.

But these developments create their own new challenges. The multiplicity of competition laws means that some multinational transactions are subject to review by numerous jurisdictions. Review by multiple jurisdictions imposes real costs on the affected parties, costs that sometimes function as a tax on efficient transactions. Those costs can be especially burdensome if the number of reviewing jurisdictions is large or if they have inconsistent procedural or substantive requirements.

The principal challenge facing the international competition law community at the turn of the Century, therefore, is to develop an optimal level and type of competition law enforcement -- one that preserves the reduction of barriers to international trade and the resulting openness of national markets, prevents anticompetitive private restraints on competition, avoids unnecessary transaction costs resulting from competition law enforcement, and respects the sovereign needs of each country.

We can meet this challenge by embracing our shared commitment to the promotion of competition and working together in the spirit of international cooperation. Our experience has shown that international antitrust enforcement cooperation, not only enhances the efficacy of antitrust enforcement, but also leads both to a reduction of tensions revolving around sovereign

concerns and to a convergence in the way nations see problems and their solutions. Through both closer international cooperation and continuing dialogue, we will be able to develop an increasingly shared view of the appropriate role for and methods of competition law enforcement. Doing so will reduce differences among competition authorities and thereby enable an increased role for principles of deference and comity in international competition law enforcement. Although this process will take time, it will be a process built on a firm foundation of shared understanding and interests that will allow us to make competition policy a centerpiece for continued economic growth and development in the 21<sup>st</sup> Century.